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 MOTI KOKA

**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MOTI KOKA

Plaintiff,

v.

BANK OF AMERICA, NATIONAL  
 ASSOCIATION, MORTGAGE  
 ELECTRONIC REGISTRATION SYSTEMS,  
 INC. AND HSBC BANK USA, NATIONAL  
 ASSOCIATION AS TRUSTEE FOR  
 MERRILL LYNCH ALTERNATIVE LOAN  
 TRUST 2007-AF1 MORTGAGE PASS  
 THROUGH CERTIFICATES, SERIES 2007-  
 AF1

Defendant(s).

) Case No.: C13-3930-RS  
 )  
 ) JUDGE: Hon. Richard J. Seeborg  
 )  
 ) **PLAINTIFF'S OPPOSITION TO**  
 ) **DEFENDANTS' NOTICE OF**  
 ) **MOTION AND MOTION FOR**  
 ) **SUMMARY JUDGMENT OR, IN**  
 ) **THE ALTERNATIVE, SUMMARY**  
 ) **ADJUDICATION; SUPPORTING**  
 ) **MEMORANDUM OF POINTS AND**  
 ) **AUTHORITIES**  
 )  
 ) Filed concurrently with Opposition to Request  
 ) for Judicial Notice in Support of Motion for  
 ) Summary Judgment  
 )  
 ) **DATE: January 23, 2014**  
 ) **TIME: 1:30 p.m.**  
 ) **CTRM: 3- 17<sup>th</sup> Floor**  
 )  
 ) Complaint filed: August 23, 2013  
 ) Trial Date: None  
 )

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**TO THE COURT, DEFENDANTS, ATTORNEYS OF RECORD AND ALL INTERESTED PARTIES:**

Plaintiff MOTI KOKA opposes Defendants' Motion for Summary Judgment Or, In The Alternative, Summary Adjudication pursuant to Fed. R. Civ. P. 56. Plaintiff's Opposition is based on the accompanying Memorandum of Points and Authorities, the Verified Complaint, the Declaration of Charles T. Marshall and the record of the case.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. OVERVIEW**

Plaintiff Moti Koka sues Bank of America, National Association ("BANA"), Mortgage Electronic Registration Systems, Inc. ("MERS") and HSBC Bank USA, National Association ("HSBC"), as trustee for the Merrill Lynch Alternative Loan Trust 2007-AF1, Mortgage Pass Through Certificates, Series AF1 for the wrongful foreclosure of his real property located at 1591 Pacific Avenue, Alameda, Alameda County, California 94501. He seeks to quiet title to the property in his name, alone, and to cancel certain land records. In addition, he seeks to unwind the wrongful foreclosure and asserts claims for slander of title, cancellation of instruments, fraud, violation of California Civil Code section 2934(a)(1)(A) and violation of the Business & Professions Code section 17200 *et seq.*

The thrust of Plaintiff's case is that the beneficial interest in Plaintiff's loan held by Countrywide Bank FSB, the original lender, and that of MERS, its nominee, was extinguished in 2007 when Countrywide sold the loan, for value received, to the Merrill Lynch Alternative Loan Trust 2007-AF1, Mortgage Pass Through Certificates, Series AF1, Stack II. Defendant HSBC serves as Trustee for this mortgage-backed securities trust. Plaintiff's Complaint is further predicated on his well-supported allegations that the Defendants have filed fraudulent foreclosure documents and committed egregious violations of California's non-judicial foreclosure statute. As a result, none of the parties named as Defendants to this action was a real party in interest having standing to conduct the trustee's sale of his real property or to otherwise enforce his mortgage.

Moreover, summary disposition of this action is inappropriate. Discovery has not yet taken place and Plaintiff should be afforded the opportunity to discover additional evidence to support his

1 well-pled claims. Furthermore, Defendants dispute most of the allegations in the Complaint. *See*  
 2 Defendants' Answer to Complaint at 2-6. Defendants have failed to meet their burden of persuasion  
 3 that there is an absence of a genuine issue of material fact. The Motion for Summary Judgment  
 4 ("Motion") is not supported by any affidavits, declarations<sup>1</sup> or any evidence which might establish  
 5 the propriety of summary judgment. For these reasons, Defendants' Motion should be denied in its  
 6 entirety.

## 7 **II. FACTUAL BACKGROUND**

8 On April 3, 2007, Moti Koka executed a Deed of Trust and ten-year interest-only Adjustable  
 9 Rate Note which were recorded on April 10, 2007 in the Alameda County Recorder's Office. The  
 10 original lender is Countrywide Bank FSB and the trustee is CTC Real Estate Services. MERS is  
 11 identified as the lender's nominal beneficiary. Complaint, ¶ 6 and Exhibit "A" thereto. The original  
 12 servicer of Plaintiffs' loan was Countrywide Home Loans Servicing, LP.  
 13 Subsequently, BAC Home Loans assumed the servicing of the loan. Defendant BANA became the  
 14 servicer as a result of its merger with BAC. Compl., ¶ 7.

15 Koka's mortgage loan was securitized and sold to the Merrill Lynch Alternative Loan Trust  
 16 2007-AF1, Mortgage Pass Through Certificates, Series AF1, Stack II ("MANA 2007-AF1 Trust"),  
 17 on or before May 30, 2007, the Closing Date of this mortgage-backed securities trust. Compl., ¶ 8  
 18 and Prospectus Supplement referenced therein, and Exhibit "B". The sale to the MBS Trust served  
 19 to extinguish the beneficial and any other interest in Plaintiff's loan held by Countrywide and  
 20 MERS.

21 On May 23, 2011, Beverly Brooks, Assistant Secretary of MERS, executed an Assignment  
 22 of Deed of Trust purporting to assign all beneficial interest in Plaintiff's deed of trust, which  
 23 it no longer possessed, to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans  
 24 Servicing, LP on behalf of an unidentified beneficiary. Compl., ¶ 17 and Exhibit "C" thereto. The  
 25 Assignment was recorded on June 1, 2011. Where, as here, an assignment of a deed of trust was

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26  
 27 <sup>11</sup> Although Defendants' Motion for Summary Judgment states that is based, in part, on the  
 28 Declaration of Bank of America, no such Declaration accompanies the Motion. *See* Motion at 1.  
 Defendants should not be permitted to include a declaration in their Reply as Plaintiff will not have  
 an opportunity to review and contest the document.

1 executed after the closing date of a securities pool, a plausible inference arises that at least some part  
2 of the recorded assignment was fabricated. *Vogan v. Wells Fargo*, 2011 WL 5826016 (E.D. Cal.  
3 2011).

4 When the assignment was executed, Plaintiff was behind in his mortgage payments. *See*  
5 Notice of Default, attached to the Complaint as Exhibit “E” (stating that as of August 8, 2011,  
6 Plaintiff owed \$42,994.20 in unpaid mortgage payments). The fact that BAC/BANA would  
7 purchase a non-performing mortgage loan is further evidence that the assignment is knowingly  
8 fraudulent and therefore void. Defendant MERS was not a valid beneficiary and had no power to  
9 make the assignment in the first place as its beneficial interest in Plaintiff’s DOT was extinguished  
10 in 2007, when it sold the loan to the MANA 2007-AF1 Trust. Moreover, all defendants knew that  
11 Defendant HSBC BANK USA was the true, albeit invalid, beneficiary as trustee for the MBS Trust.  
12 Defendants conspired to file this sham document only in preparation for the foreclosure sale of  
13 Plaintiff’s home to unload a non-performing loan knowing that none of them had authority to do so.  
14 For all of the foregoing reasons, the Assignment is fraudulent, null and void.

15 On August 9, 2011, T. Sevillano, falsely claiming to work for Bank of America, N.A.,  
16 successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing,  
17 LP, executed a Substitution of Trustee purporting to substitute Recontrust Company, N.A. for the  
18 original Trustee under Plaintiff’s deed of trust. The Substitution was recorded on August 10, 2011.  
19 Compl., ¶ 19 and Exhibit “D” thereto. The foregoing Substitution of Trustee flows from the illegal  
20 August, 2011 Assignment of Deed of Trust; therefore, the Substitution is likewise illegal and void.  
21 Specifically, as BANA had no valid beneficial interest in Plaintiff’s loan, it had no power under Cal.  
22 Civ. Code section 2934 to execute a Substitution of Trustee. Therefore, the Substitution of Trustee  
23 is void and of no legal force and effect. The Substitution of Trustee is void for an additional reason.  
24 Specifically, T. Sevillano, whose full name is Tina Sevillano, is not employed by Bank of America  
25 but, instead, works for Recontrust in its Costa Rica office. *See* Complaint, ¶ 21. Therefore, the  
26 proposed substitute trustee impermissibly attempted to substitute itself.

27 On August 9, 2011, the same day that the Substitution of Trustee was executed, T. Sevillano,  
28 this time claiming to work for Recontrust, executed a Notice of Default and Election to Sell Under



1 Deed of Trust (“NOD”) against Plaintiff. The NOD was recorded on August 10, 2011. Compl., ¶ 22  
 2 and Exhibit “E” thereto. The NOD and Substitution of Trustee flow from the fraudulent and void  
 3 Assignment of Deed of Trust and are likewise fraudulent and void. Consequently, **there was no**  
 4 **statutory default!**

5 On December 9, 2011, Recontrust recorded a Notice of Trustee’s Sale (“NOTS 1”) against  
 6 the Subject Property. The trustee’s sale scheduled for January 3, 2012 did not take place.

7 On May 11, 2012, Recontrust on behalf of Bank of America, for the benefit of MANA 2007-  
 8 AF1 Trust, the purported beneficiary, filed a Notice of Rescission of Notice of Trustee’s Sale.  
 9 Compl., ¶ 24 and Exhibit “G” thereto. In fact, BANA for the benefit of the MANA 2007-AF1 Trust  
 10 held no beneficial interest in Plaintiff’s loan until BANA conveyed its interest to MANA 2007-AF1  
 11 Trust on June 21, 2012. Nevertheless, the Notice of Rescission is further evidence that BOA was a  
 12 pretender beneficiary- a loan servicer acting on behalf of HSBC, trustee of the MBS trust.

13 On May 30, 2012, Recontrust recorded a second Notice of Trustee’s Sale (“NOTS 2”)  
 14 against the Subject Property.

15 On June 21, 2012, Christina Balandran, Asst. Vice President of Bank of America, N.A.,  
 16 Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing,  
 17 LP executed a Corporation Assignment of Deed of Trust purporting to assign and transfer to Bank  
 18 of America, N.A., Successor By Merger to BAC Home Loans Servicing, LP fka Countrywide Home  
 19 Loans Servicing, LP, for the Benefit of the MANA 2007-AF1 Trust all beneficial interest in  
 20 Plaintiff’s Deed of Trust. The Assignment was recorded on June 29, 2012. Compl., ¶ 26 and  
 21 Exhibit “I” thereto.

22 On June 21, 2012, Recontrust sold Plaintiff’s property to BANA at a trustee’s sale for the  
 23 benefit of the MANA 2007-AF1 Trust. On June 29, 2012, Recontrust recorded a Trustee’s Sale  
 24 Upon Deed formally conveying Plaintiff’s property to BANA on behalf of the Trust. Compl., ¶ 27  
 25 and Exhibit “J” thereto.

26 The Trustee’s Deed is clearly fraudulent. First, both the Assignment from MERS  
 27 to BAC in June , 2011 and the Corporation Assignment of Deed of Trust from BANA for HSBC in  
 28

June, 2012, are fraudulent mortgage documents<sup>2</sup> constituting felonious criminal activity<sup>3</sup> designed to cover up the botched securitization of Plaintiff's mortgage loan. In addition to the fraud described in the preceding paragraphs of this Opposition, the second assignment is obviously an attempted assignment, not to BANA, but to HSBC as trustee of the MANA 2007-AF1 Trust and BANA's attempt to obscure this fact by conveying the beneficial interest to itself (which it purportedly already had pursuant to the first assignment), on behalf of the trust is but a clumsy attempt to cover up the failed securitization. Instead of raising a red flag by making a belated and prohibited assignment of Plaintiff's deed of trust directly to the MBS Trust five years after the Closing Date of the Trust, the Defendants conspired to make fraudulent assignments to BANA. Clearly, BANA was a pretender beneficiary trying to unload Plaintiff's non-performing loan on behalf of HSBC, the trustee of the MANA 2007-AF1 Trust.

The foreclosure documents and Trustee's Deed are based on fraud and therefore void for the additional reason that HSBC did not issue an NOD or a Notice of Trustee's Sale prior to the illegal foreclosure sale of Plaintiff's property. California Civil Code section 2924(a)(1)(C) requires that the NOD set forth the nature of the breaches of the terms of the deed of trust actually known to the current beneficiary. HSBC never issued its own NOD advising Plaintiff of the nature of any breaches actually known to it in contravention of section 2924(a)(1)(C). Therefore, Plaintiff had no notice of any breach of his mortgage obligations to the MBS trust and, therefore, no opportunity to cure any alleged default. Additionally, section 2924 further provides that a Notice of Trustee's Sale cannot be issued less than three months following issuance of the NOD.

As the wrongful foreclosure of Plaintiff's property is based on egregious violations of California's nonjudicial foreclosure statute and knowing fraud, the unlawful sale is void must be unwound.

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<sup>2</sup> Cal. Penal Code § 532(f)(a) provides that "a person commits mortgage fraud if, with the intent to defraud, the person does any of the following ... (4) files or causes to be filed with the recorder of any county in connection with a mortgage loan transaction any document the person knows to contain a deliberate misstatement, misrepresentation, or omissions."

<sup>3</sup> California Penal Code § 115 provides that: Any person who knowingly procures or offer any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine might be filed, registered or recorded under any law of this state or of the United States, is guilty of a felony.

1  
2 Moreover, Defendant Bank of America and its predecessors claimed a right to collect  
3 mortgage payments from Plaintiff as the purported servicer of his loan. However, neither defendant  
4 Bank of America nor its predecessors was a valid servicer. The true beneficiary is unknown after  
5 the chain of title the property was irreversibly broken when the original lender sold Plaintiff's  
6 mortgage loan but *failed* to effectively transfer, assign and convey it to the securitization trust for the  
7 benefit of the unknown and multiple investors (Certificateholders) who funded the purchase of  
8 Plaintiffs' NOTE and DOT. Therefore, the "servicing" cannot be, and was never, authorized by the  
9 MBS Trust or by the original mortgage lender. Moreover, as Plaintiff's loan was sold to the MBS  
10 Trust prior to Bank of America's acquisition of Countrywide in 2008, Plaintiff's mortgage loan was  
11 not among the Countrywide assets purchased by Bank of America.

12 It is important to recognize that Plaintiff's standing argument does not turn on whether or not  
13 the attempt to securitize his loan was successful, that is, comported with the chain of title protocol  
14 mandated by the Pooling and Servicing Agreement and other trust documents. Plaintiff contends  
15 that the securitization of her loan, without more, extinguished any interest in his loan held by  
16 Countrywide and MERS.

17 However, it is an indisputable fact that the attempted securitization of Plaintiff's loan failed.  
18 The MBS trust to which Plaintiff's loan was sold is a trust organized under the laws of New York  
19 and governed by New York trust law. New York Estates, Powers & Trusts Law section 7-2.4  
20 provides: "If the trust is expressed in an instrument creating the estate of the trustee, every sale,  
21 conveyance or other act of the trustee in contravention of the trust... is void." The attempted  
22 assignment of Plaintiff's loan to BANA on behalf of the MANA 2007-AF1 Trust- five years after  
23 the Closing Date the Trust - is irrefutable proof that Plaintiff's loan was securitized and that the  
24 2007 securitization failed.

25 To date, only one California court has considered the standing of the trustee of an MB Trust  
26 to enforce the terms of mortgage executed in California where violations of New York trust law  
27 renders the securitization of a particular loan void. In *Glaski v. Bank of America, N.A.* (2013) 218  
28 Cal. App. 4<sup>th</sup> 1079, the court applied New York law in holding that Plaintiff Glaski's factual

1 allegations regarding post-closing date attempts to transfer his deed of trust into the securitized trust  
 2 were sufficient to state a basis for concluding that the attempted transfers were void. The court  
 3 further held that Glaski had stated a cognizable claim for wrongful foreclosure under the theory that  
 4 the entity invoking the power of sale (Bank of America in its capacity as trustee for the WaMU  
 5 securitized trust) was not the holder of the Glaski deed of trust.

6 Although the California district courts are split as to whether a plaintiff has standing to  
 7 challenge a securitization transaction not organized under New York law, the courts have  
 8 consistently followed the clear mandate of our state legislature that only holders of the beneficial  
 9 interest in a mortgage loan, and their agents acting within the scope of their delegated authority, may  
 10 initiate and pursue foreclosure activity against a defaulting borrower. *See* Cal Civ. Code sections  
 11 2924(a) (1) and (a) (6). The weight of California authority recognizes that where, as in this case, the  
 12 plaintiff alleges that the sale of the mortgage loan to a securities trust precluded the defendant from  
 13 retaining a beneficial interest in the deed of trust and that, consequently, the defendant is not the true  
 14 beneficiary, has failed to abide by rules regarding transference of the loan and has directed the  
 15 wrong party to issue the Notice of Default and other foreclosure documents, plaintiff has sufficiently  
 16 stated a claim for wrongful foreclosure.

### 17 **III. STANDARD OF REVIEW**

18 The purpose of summary judgment is to identify and dispose of factually unsupported  
 19 claims and defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary  
 20 Judgment is therefore appropriate if “the movant shows that there is no genuine dispute as to  
 21 any material fact and the movant is entitled to judgment as a matter of law”. Fed. R. Civ. P.  
 22 56(a). “A party asserting that a fact cannot be or is genuinely disputed must support the  
 23 assertion, “ and can do so in either of two ways: by “citing to particular parts of materials in the  
 24 record, including depositions, documents, electronically stored information, affidavits or  
 25 declarations, stipulations (including those made for purposes of the motion only), admissions,  
 26 interrogatory answers, or other materials”; or by “showing that the materials cited do not  
 27 establish the absence or presence of a genuine dispute, or that an adverse party cannot produce  
 28 admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1).

1 The moving party has the burden of persuading the court as to the absence of a genuine  
 2 issue of material fact. *Celotex*, 477 U.S. at 323; *Miller v. Glenn Miller Prods.*, 454 F.3d 975,  
 3 987 (9<sup>th</sup> Cir. 2006). When evaluating a motion for summary judgment, the court must construe  
 4 all evidence and reasonable inferences drawn therefrom in the light most favorable to the  
 5 nonmoving party. See *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F. 2d 630-31  
 6 (9<sup>th</sup> Cir. 1987). Accordingly, if “reasonable minds could differ as to the import of the  
 7 evidence”, summary judgment will be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
 8 250-51 (1986).

9 “If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot  
 10 present facts essential to justify its opposition, the court may: (1) defer considering the motion  
 11 or deny it.” Fed. R. Civ. P. 56 (d)(1).

#### 12 **IV. ARGUMENT**

##### 13 **A. Plaintiff’s Claims Are Not Barred By the Equitable Doctrine of Judicial** 14 **Estoppel**

15 Preliminarily, Defendants argue that all of Plaintiff’s claims should be barred under the  
 16 equitable doctrine of judicial estoppel.<sup>4</sup> Motion at 8-10. Defendants’ argument is based exclusively  
 17 on the decision in *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9<sup>th</sup> Cir. 2001) and cases  
 18 cited therein. There, the court described the judicial estoppel doctrine as follows:

20 Judicial estoppel is an equitable doctrine that precludes a party from gaining an  
 21 advantage by taking a clearly inconsistent position. This court invokes judicial  
 22 estoppel not only to prevent a party from gaining an advantage by taking inconsistent  
 23 positions, but also because of “general consideration[s] of orderly administration of  
 24 justice and regard for the dignity of judicial proceedings,” and to “protect against a  
 25 litigant playing fast and loose with the courts. *Id.* at 782 (citations omitted).

26 The United States supreme Court has identified three factors that courts may  
 27 consider in determining whether to apply the judicial estoppel doctrine:

28 First, a party’s later position must be clearly inconsistent with its earlier position.

---

26 <sup>4</sup> Defendants also argue that Koka has no standing to bring the instant action because he is  
 27 currently engaged in Chapter 7 bankruptcy proceedings. Motion at 6-8. However, elsewhere  
 28 Defendants admit that Koka was discharged in bankruptcy on November 1, 2013 and that the case  
 was closed on that date. Motion at 3; Request for Judicial Notice, Ex. 22. Defendants’ deliberate  
 attempt to mislead this court should not be tolerated.

Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding could create the "perception that either the first or second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and this no threat to judicial integrity. *Id.* at 782-783 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 1815 (2001)).

11 U.S.C. section 521(1) provides that "[t]he debtor shall file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs". Interpreting this provision, the courts have determined that failure to give notice of a potential cause of action in bankruptcy schedules and Disclosure Statements estops the debtor from prosecuting that cause of action. *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F. 2d 555, 557 (9<sup>th</sup> Cir. 1992), cited in *Hamilton, supra* at 785.

In *Hamilton*, Plaintiff Hamilton listed \$160,000 in vandalism loss on his bankruptcy schedules. The bankruptcy trustee specifically asked Hamilton to provide "correspondence or other writings concerning said vandalism, including any correspondence with insurance companies to recover the amount of the vandalism". *Hamilton, supra* at 781. Hamilton responded to the trustee but withheld letters from his attorneys to State Farm threatening litigation if the insurance company failed to pay his claim for the vandalism. *Id.* Hamilton filed suit against State Farm one year later and, under the foregoing circumstances, the court invoked the judicial estoppel doctrine to bar Hamilton's claims.

In the instant case, Defendants acknowledge that Plaintiff listed the Subject Property on his bankruptcy schedules as having been sold in bankruptcy. Motion at 3; RJN, Ex. 16 at 21. Therefore, Plaintiff no longer held title to the property when he initiated bankruptcy proceedings and, thus, the property was never in the bankruptcy trustee's estate. Defendants also allege that Koka failed to list the claims raised in the then-pending Alameda County court action as an unliquidated or contingent assets of the estate. Motion at 3. Defendants refer to RJN, Ex. 16 at p. 5. However, page five is missing from the exhibit. In any event, Koka's Superior Court case is specifically listed on his Statement of Financial Affairs, section 4: "suits and administrative proceedings, executions, garnishments and attachments". Defendants' RJN, Ex. 6. That case, which named Bank of America

1 as the defendant, encompasses the same claims asserted by Plaintiff in this action. Therefore,  
 2 Plaintiff did not take a position in the bankruptcy proceedings which is inconsistent with the instant  
 3 action.

4 Moreover, the instant law suit was filed while Plaintiff's bankruptcy was still pending.  
 5 Plaintiff failed to amend his bankruptcy schedules to include this action. However, Defendants were  
 6 not prejudiced by that failure. Specifically, the Defendants, obviously, were served with the  
 7 Complaint before Plaintiff was discharged on November 1<sup>st</sup>. Therefore, Defendants' statement that  
 8 "Koka's failure to announce the claims on the schedules, therefore, deceived the bankruptcy court  
 9 and Koka's creditors who relied, or may rely, upon those schedules to determine which course of  
 10 action they would consider" is disingenuous at best.

11  
 12 For the foregoing reasons, this court should not invoke judicial estoppel to bar Plaintiff's  
 13 claims.

14  
 15 **B. Plaintiff Has Overcome the Presumption that Defendants' Foreclosure  
 Activities Were Properly Conducted**

16 Defendants contend that Plaintiff cannot overcome the presumption that the non-judicial  
 17 foreclosure sale was lawful. Motion at 4. Specifically, Defendants contend that Koka has failed to  
 18 allege prejudice from the alleged "irregularities" in the foreclosure activities. *Id.* at 4-5. However,  
 19 Plaintiff does not allege mere irregularities in Defendants' foreclosure sale; instead, he alleges that  
 20 the illegal trustee's sale and related foreclosure activities are fraudulent, null and void. Compl., ¶¶  
 21 37-44.

22 Defendants incorrectly argue that the 2011 and 2012 assignments have no affect on  
 23 Plaintiff's mortgage obligations; consequently, he cannot show prejudice from their illegal conduct.  
 24 Plaintiff has standing to challenge the fraudulent and void assignment. *See Glaski, supra at 18*;  
 25 *Reinagel v. Deutsche Bank National Trust Co.* (5<sup>th</sup> Cir. 2013) \_\_\_F.3d\_\_\_[2013 WL 3480207at  
 26 p. \*3]; 7 Cal. Jur. 3d (2012), Assignments, section 43. Defendants refer to *Jenkins v. JP*  
 27 *Morgan Chase Bank, N.A.*, (2013) 216 Cal. App. 4<sup>th</sup> 497, 515, *Fontenot v. Wells Fargo Bank,*  
 28 *N.A.*, 198 Cal. App. 4<sup>th</sup> 256 (2011) in support of their position that Plaintiff cannot allege



1 prejudice. Plaintiff, in fact, has alleged harm. Compl., ¶ 43.

2 In *Jenkins* and *Fontenot*, Plaintiff challenged MERS' authority, without more, to assign  
3 the beneficial interest under the DOT as nominee for the lender and that Plaintiff should have  
4 anticipated that the mortgage loan might be assigned from one creditor to another. Based on  
5 these facts, the court determined that the plaintiff was required to allege not only that MERS'  
6 purported assignment was invalid but that HSBC, the assignee, did not receive an assignment of  
7 the debt in any other manner. The court observed that the plaintiff had made no such  
8 allegation. In the instant action Plaintiff's complaint sets forth well-supported allegations  
9 establishing that neither BANA, the purported loan servicer, nor HSBC, as trustee for the MBS  
10 Trust is, or was, a valid beneficiary under any conceivable factual scenarios. Here, Plaintiff  
11 alleges that the assignments and foreclosure documents filed by, and on behalf, of the Defendants  
12 are fraudulent and void. *Jenkins* and *Fontenot* addressed allegations of mere irregularities in the  
13 foreclosure process and, therefore, is inapposite to the instant case.

14 The pre-emptive cases, such as *Fontenot* and *Jenkins* merely challenge MERS' authority to  
15 assign a deed of trust and do not allege misconduct on the part of the defendants and must be  
16 narrowly construed; otherwise the non-judicial foreclosure statute will be eviscerated. Where, as  
17 here, Plaintiff alleges that defendants have no standing to pursue foreclosure, prejudice sufficient to  
18 maintain a cause of action for wrongful foreclosure is established.

19 Plaintiff has every right to protect his property rights and due process rights guaranteed  
20 by California's Constitution. See *Glaski v. Bank of America, N.A.*, (2013) 218 Cal. App. 4<sup>th</sup>  
21 1079 (reh'g denied); *Barrionuevo v. Chase Bank, N.A.*, C12-0572 EMC (N.D. Cal. Aug. 6, 2012)  
22 at 11; *Sacchi v. Mortgage Electronic Registration Systems, Inc.*, No. CV 11-1658 AHM (CW,),  
23 2011 WL 2533029, at \*9-10 (C.D. Cal. June 24, 2011); and *Robinson v. Countrywide Home Loans,*  
24 *Inc.*, Case No. E052011 (CA Dist. 4 Ct. App., Div. 2, Sept. 12, 2011) at 7 n.5 ("a borrower who  
25 believes that the foreclosing entity lacks standing to do so" is not "without a remedy. The borrower  
26 can seek to enjoin the trustee's sale or to set the sale aside.").

27 In *Ohlendorf v. Am. Home Mortg. Servicing*, 279 F.R.D. 575, 583 (E.D. Cal. 2010), the court  
28 denied defendants' motion to dismiss plaintiff's wrongful foreclosure claim insofar as it was is



1 premised on defendants not being proper beneficiaries ruling that while proof of possession of the  
 2 note is not necessary to legally institute non-judicial foreclosure proceedings against plaintiff, the  
 3 plaintiff still has a viable claim for wrongful foreclosure insofar as he argues that defendants are not  
 4 the proper parties to foreclose. Further, in *Castillo v. Skoba*, No. 10 CV 1838 BTM, 2010 WL  
 5 3986953, at \*2 (S.D. Cal. Oct. 8, 2010), the court granted a preliminary injunction in a wrongful  
 6 foreclosure case where it concluded that the “[p]laintiff is likely to succeed on the merits of his  
 7 claim that neither Aurora nor Cal-Western had authority to initiate the foreclosure sale at the time  
 8 the Notice of Default was issued. Even in the widely misconstrued *Gomes v. Countrywide Home*  
 9 *Loans, Inc.*, 192 Cal. App. 4<sup>th</sup> 1149, 1156 (2011), the court, while upholding dismissal of Plaintiff’s  
 10 wrongful foreclosure because Plaintiff sought a determination as to whether MERS had the  
 11 authority to foreclose, without presenting any evidence that it did not, noted that a wrongful  
 12 foreclosure action was proper where the Plaintiff identifies a specific factual basis for alleging that  
 13 the foreclosure was not initiated by the correct party.

14 It is indisputable that, under California law, foreclosure activity conducted by entities  
 15 without authority to do so is null and void.

16 The California non-judicial foreclosure statute does not mandate that only borrowers who are  
 17 not in default are afforded the due process protections of the statute. The statute does make it clear  
 18 that only mortgagees, beneficiaries or agents acting on their behalf, may pursue foreclosure  
 19 activities against a defaulting borrower. *See* Cal. Civil Code sections 2924(a)(1) and (a)(6). Where,  
 20 as here, Plaintiff has offered facts that establish that no Defendant to the action is a real party in  
 21 interest with standing to enforce his mortgage, and further allege numerous, egregious violations of  
 22 the non-judicial foreclosure statute, a wrongful foreclosure action is the appropriate vehicle for  
 23 challenging the illegal and void foreclosure activity.

24  
 25 **C. The Wrongful Foreclosure is Void; Therefore, Tender of the Unpaid Debt Is  
 Neither Required Nor Equitable**

26 Defendants argue that Plaintiff’s Wrongful Foreclosure, Quiet Title and Cancellation of  
 27 Instruments claims are barred as he has not alleged tender of mortgage arrearages. Motion at 5-6,19.  
 28 It is well-settled law that where, as here, Defendants’ wrongful foreclosure activities are void, and

not merely voidable, tender is not required. Plaintiff contends that defendants BANA and HSBC and their agents, pursued foreclosure activity against him without authority to do so. *See, e.g.,* Compl., ¶¶ 16-44, 47-48, 59-72. Therefore, any ensuing foreclosure sale is void, not voidable. Under these circumstances, tender of the outstanding mortgage debt is neither required nor equitable. *Subramani v. Wells Fargo Bank, N.A., et al.*, No. C13-1605 SC (N.D. Cal. Oct. 30, 2013); *Frazier v. Aegis Wholesale Corp.*, 2011 WL 603391 (E.D. Cal. Dec. 16, 2011); *Tamburri v. Suntrust Mortgage, et al.* No. C-11-2899 EMC WL 6294472 (N.D. Cal. Dec. 15, 2011); *Sacchi v. Mortgage Electronic Registration Systems, Inc.*, No. CV-11-1658 AHM (CWx) 2011 WL 2533029 at \*2 (S.D. Cal. June 24, 2011); *Fleming v. Kagan* (1961) 289 Cal. App. 2d 791 (tender rule does not apply where the plaintiff alleges that documents were executed as a result of fraud and without plaintiffs' knowledge that the instruments were void); *Humboldt Sav. Bank v. McClevery* (1911) 161 Cal. 285, 291; *In Re Salazar*, 448 B.R. 814, 819 (S.D. Cal. 2011).

Moreover, it is well-settled that plaintiff is not required to allege tender to the defendants if they, in fact, are not the true owners of the loan. *Miller v. Carrington Mortg. Services*, C-12-2282 EMC, 2012 WL 3537056, at \*6 (N.D. Cal. Aug. 14, 2012), quoted in *Almutarreb; Frazier v. Aegis Wholesale Corp.*, No. C-11-4850 EMC 2011 ("[i]f Plaintiffs are correct in arguing that none of the defendants own the loan, then Plaintiffs should have no obligation to tender any money at all to any defendant, including the quiet title claim").

#### **D. Securitization Deprived Defendants of Standing to Foreclose**

Nowhere in the summary judgment motion do Defendants concede that Plaintiff's loan was securitized. *See, e.g.,* Motion, Statement of Facts at 2-3. This is an issue in dispute and Plaintiff will conduct discovery to support his claim that his loan, in fact, was sold to the MANA 2007-AF1 Trust. Instead, Defendants claim that if Plaintiff's mortgage loan was securitized, securitization did not deprive them of the authority to foreclose on Plaintiff's property. Motion at 10-13. Plaintiff disagrees. Plaintiff raises the securitization of his mortgage loan to support his contention that MERS' authority to convey the beneficial interest in Plaintiff's loan was extinguished when the loan was sold to the MBS trust.

Defendants appear to make the preposterous argument that when MERS, as agent for

1 Countrywide, sold Plaintiff's Loan in 2007 to the MANA 2007-AF1 Trust, for valued received,  
 2 MERS somehow retained a beneficial interest in the loan after the sale of all its right, title and  
 3 interest. This argument is nonsense and not supported by the facts or the case law referenced in  
 4 Defendants' Motion for Summary Judgment. *See Cerezo v. Wells Fargo Bank, N.A.* 2013 WL  
 5 4029274 (N.D. Cal. Aug. 6, 2013) (the seller of the beneficial interest in a promissory note to a  
 6 securities trust does not retain the rights to foreclose on property).

7 In the Complaint, Plaintiff alleges that MERS's beneficial interest in Plaintiff's  
 8 mortgage was extinguished in 2007 when it sold the loan to the MBS Trust. He also alleges  
 9 that, as the securitization of his mortgage failed, the chain of title is irrevocably broken and the  
 10 current beneficiary under the Deed of Trust with the power of sale is unknown. Plaintiff refers  
 11 to the failed attempt to securitize his loan as evidence that the belated attempts to assign his  
 12 Deed of Trust to the MBS Trust is knowingly fraudulent as MERS, BANA and HSBC knew  
 13 full well that none of them had an interest to convey in 2011 and 2012 when the assignments  
 14 was executed. The *only* plausible inference to be derived from these belated assignments to the  
 15 purported loan servicer, at a time when the loan was in default status, is that the securitization  
 16 of Plaintiff's loan failed and MERS, BANA and HSBC all knew that BANA and HSBC had no  
 17 standing to exercise the power of sale. For what other reason would BANA purchase a non-  
 18 performing loan if HSBC already had the power to foreclose on Plaintiff's delinquent loan? *See,*  
 19 *e.g., Subramani, supra*, at 8 ("this case is not like the cases Defendant cites, in which the plaintiffs  
 20 rely solely on violations of a PSA or securitization in itself. Plaintiff has sufficiently stated a claim  
 21 for wrongful foreclosure based on his allegations that Defendant's 2006 sale of Plaintiff's DOT  
 22 precluded Defendant from retaining a beneficial interest in the DOT"). *Herrera v. Deutsche Bank*  
 23 *National Trust Co.*, 196 Cal. App. 4<sup>th</sup> 1366, 1378 (ruling that Deutsche Bank is not entitled to  
 24 summary judgment on a wrongful foreclosure claim because it failed to show a chain of ownership  
 25 that would establish it was the true beneficiary under the deed of trust). *See also Johnson v. HSBC*  
 26 *Bank USA, N.A.*, 2012 WL 928433\*2 (S.D. Cal. March 19, 2012) (a plaintiff who alleges violation  
 27 of the Pooling and Service Agreement *and* relevant law is not excluded from making claims based  
 28 on allegations surrounding the loan's securitization); *Cerezo v. Wells Fargo Bank, N.A.* 2013 WL

1 4029274 (N.D. Cal. Aug. 6, 2013) ( the seller of the beneficial interest in a promissory note to a  
2 securities trust does not retain the rights to foreclose on property).

3 In *Javaheri v. JPMorgan Chase Bank, N.A.*, CV-10-08185 ODW FFMX, 2011 WL -  
4 securities trust prior to its closure by the U.S. Office of Thrift Supervision and JPMorgan's  
5 subsequent acquisition of its assets. The court took note of the fact that the plaintiff had  
6 produced specific facts regarding the transfer of Plaintiff's Note suggesting that Washington  
7 Mutual had indeed alienated its beneficial interest to plaintiff's deed of trust prior to  
8 JPMorgan's later acquisition of Washington Mutual's assets. *Id.* See also *Barrionuevo v.*  
9 *Chase Bank, N.A.* No. C-12-0572 EMC (Aug. 6, 2012) (wherein the court denied Chase's  
10 Motion to Dismiss where Plaintiffs alleged that its Notice of Default was issued after alienation  
11 of Plaintiff's deed of trust by Washington Mutual).

12 All of the cases referenced by the Defendants involve "pre-emptive judicial action  
13 challenging the defendants' authority to foreclose. An action is pre-emptive if the plaintiff  
14 alleges no specific facts supporting the claim that foreclosure was not initiated by the correct  
15 party. See *Siliga v. Mortgage Electronic Registration Systems, Inc.*, 219 Cal. App. 4<sup>th</sup> 75, 85  
16 (2013). A pre-emptive suit usually merely challenges the MERS system and does not seek a  
17 remedy for specified misconduct in the non-judicial process, which may provide a basis for a  
18 valid cause of action. *Id.*; *Jenkins v. JPMorgan Chase, N.A.* (2013) 216 Cal. App. 4<sup>th</sup> 497, 512  
19 (plaintiff has no right to bring a pre-emptive judicial action to determine whether defendants  
20 have the authority to foreclose). Reference to these cases and to *Jenkins v. JPMorgan Chase,*  
21 *N.A.*, in particular, is merely Defendants' attempt to misdirect the Court.

22 Here, Plaintiff's wrongful foreclosure theory is analogous to the plaintiff's theory in  
23 *Naranjo v. SBMC Mortgage*, 2012 WL 3030370 (S.D. Cal. July 24, 2012) In *Naranjo*, plaintiff  
24 alleged that the transfer of rights to the securities trust was improper and that, therefore, the  
25 defendants lacked the legal right either to collect on the debt or to enforce the underlying  
26 security interest. *Id.* The court denied defendant's motion to dismiss on this issue ruling that  
27 "this allegation gives rise to a plausible inference that the subsequent assignment, substitution  
28 and notice of default and election to sell may also be improper". *Id.* See also *Cheung v. Wells*

1 *Fargo Bank, N.A.*, 2013 WL 6017497 at\*4 (No. C13- 01756-RS, N.D. Cal. Sept. 25, 2013)  
 2 (following *Naranjo* and holding that plaintiffs stated a wrongful foreclosure claim where they  
 3 alleged that a failed attempt to securitize their mortgage broke the chain of title Wells Fargo  
 4 relied on in foreclosure).

5 The Honorable Samuel Conti summarized the law governing this case very succinctly  
 6 and eloquently in *Subramani v. Wells Fargo Bank, N.A., et al, supra*. There, the court reviewed  
 7 many of the cases cited in the Motion to Dismiss including *Glaski, Jenkins, Newman v. Bank of*  
 8 *New York Mellon*, No. 1:12-CV-1629 AWI GSA, 2013 WL 5603316 (E.D. Cal. Oct. 11, 2013)  
 9 and *Diunugala v. JPMorgan Chase Bank* 12-CV-2106-WQH-NLS, 2013 WL 5568737 (S.D.  
 10 Cal. Oct. 3, 2013). Specifically, the court ruled on Plaintiff's wrongful foreclosure claim as  
 11 follows:

12 [t]he court DISMISSES Plaintiff's wrongful foreclosure claim to the extent  
 13 that it is predicated on Defendant's alleged violation of the PSA or any other third-  
 party agreements related to the Loan's securitization.

14 However, the court finds that at the 12(b)(6) stage, Plaintiff has sufficiently  
 15 stated a claim for wrongful foreclosure based on his allegations that Defendant's  
 16 2006 sale of Plaintiff's DOT precluded defendant from retaining a beneficial  
 17 interest in the DOT. See *Barrionuevo v. Chase Bank, N.A.*, 885 F. Supp. 2d 964,  
 975 (N.D. Cal. 2012). Plaintiff has sufficiently alleged that defendant directed the  
 18 wrong party to issue Notices of Default, that defendant is not the true beneficiary,  
 19 and that defendant failed to abide by the rules regarding transference of the Loan.  
 All of these allegations are supported by specific enough facts to state a plausible  
 claim at this point. This case is not like the cases Defendant cites, in which the  
 plaintiffs rely solely on violations of a PSA or securitization in itself. See MTD at  
 5-6.(citing cases). Defendant's motion to dismiss on these grounds in DENIED.

20 *Id.* at 8.

21 The Plaintiff in the instant case has made the same allegations that were the subject of  
 22 the court's decision in *Subramani*. Plaintiff does not seek to enforce the governing  
 23 securitization documents. Quite frankly, he does not care if the investors in the MBS trust lose  
 24 their favorable pass-through tax status. Like the plaintiff in *Subramani*, Mr. Koka alleges that  
 25 none of the defendants is a real party in interest with authority to enforce the terms of his loan.  
 26 And he need not rely on the securitization of his mortgage to support this allegation. The  
 27 belated assignment of Plaintiff's mortgage loan to BAC and then to BANA on behalf of HSBC  
 28 as trustee for the MBS trust proves that the securitization of Plaintiff's loan failed; if it had been

1 successful, the assignment to HSBC, as trustee, five years after the Closing Date of the Trust,  
 2 would have been unnecessary. Clearly, Plaintiff's mortgage was not part of the Trust's *res* in  
 3 2011 and 2012 when MERS and then BANA, in collusion with HSBC, attempted to cover up  
 4 the botched securitization by executing the fraudulent and void assignment.

5 Plaintiff should be given the opportunity to conduct discovery to obtain further  
 6 evidence that the failed attempt to securitize the loan broke the chain of title that BANA and  
 7 HSBC relied upon to foreclose. *Cheung v. Wells Fargo Bank, N.A.*, supra \*4. Plaintiff will  
 8 also conduct discovery to further support his allegations that the assignments and foreclosure  
 9 documents were knowingly fraudulent and designed to cover-up the botched securitization.

#### 10 **E. Plaintiff Has Sufficiently Stated a Claim for Wrongful Foreclosure**

11 Defendants next argue that the clearly illegal foreclosure was nevertheless not wrongful  
 12 because Koka has not legitimately alleged injury- in- fact. Motion at 13-14. First, Plaintiff has  
 13 standing to challenge the void assignments and NOD. *See* section IV.B, *supra*. Defendants  
 14 incorrectly characterize Plaintiff's complaint as challenging mere irregularities in the foreclosure  
 15 process. Motion at 13. The assignments are void for reasons thoroughly discussed above. The  
 16 NOD is null and void because it flows from the fraudulent and void assignments. HSBC never  
 17 issued its own NOD following the 2012 assignment; therefore, **there was no statutory default on**  
 18 **which Defendants could rely as conveying authority to exercise the power of sale.** Where, as  
 19 here, Plaintiff alleges that defendants have no standing to pursue foreclosure, prejudice sufficient to  
 20 maintain a cause of action for wrongful foreclosure is established. *See* section IV.B, *supra*.

#### 21 **F. Plaintiff's Quiet Title Claim Raises Triable Issues**

22 Defendants argue that Plaintiff's Quiet Title cause of action fails because Plaintiff cannot  
 23 allege tender the unpaid debt. Motion 15-16. As discussed in sections IV.C, above, Defendants'  
 24 tender argument is wholly without merit. *Glaski, supra*. (Plaintiff need not allege tender to  
 25 maintain causes of action for wrongful foreclosure, quiet title and cancellation of instruments).

#### 26 **G. Plaintiff's Slander of Title Claim Raises Triable Issues**

27 Plaintiff has alleged all elements of his Slander of Title cause of action, Defendants contrary  
 28 contention notwithstanding. Motion at 16-17. His Complaint alleges publication of the 2011 and



2012 assignments and foreclosure documents containing false statements, *see* ¶¶ 51-53, and that the false statements were published with malicious intent and are not justified or privileged. Compl., ¶¶ 54-55. Plaintiff further alleges that he has suffered direct pecuniary loss as he has been illegally dispossessed of his property and has lost the rental income it generated and was required to pay the fees of his forensic loan auditor and attorneys to uncover and address the fraudulent and illegal conduct of the Defendants Compl., ¶ 57. Finally, Plaintiff alleges that the recording of the assignments, Substitution of Trustee, Notice of Default, Notices of Trustee's Sale and Trustee's Deed Upon Sale have cast a cloud on the title to Plaintiff's Property as he alleges that Defendants and their agents had no power to enforce his mortgage. Compl., ¶ 56.

Defendants have pointed no evidence that establishes that there is no genuine issue of dispute as to Plaintiff's Slander of Title claim. For this reasons, Defendants' Motion for Summary Judgment as to the Slander of Title claim must be denied.

#### **H. Plaintiff's Fraud Claim Raises Triable Issues**

Defendants challenge Plaintiff's fraud count arguing that he has not established detrimental reliance or damages. Motion at 17-19. First, Plaintiff's Complaint not only alleges false statements made in the assignments and foreclosure documents, he quotes the fraudulent statements *verbatim*. *See* Compl., ¶¶ 65, 66 ,68. Plaintiff has stated the who, what, where, how and why surrounding her fraud claim. *See* Compl. 59-68. The heightened fraud pleading requirements do not require the Plaintiff to present relevant information which is in the sole possession of Defendants. *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal. App. 4<sup>th</sup> 153. Any missing information will be uncovered during the discovery process.

Plaintiff alleges detrimental reliance and pecuniary damages as follows:

Plaintiff justifiably relied on deliberate misrepresentations set forth in the foregoing fraudulent assignments and foreclosure documents because they appeared to be a valid documents recording valid land transactions. Compl., ¶ 69.

Consequently, Plaintiff did not seek the assistance of legal counsel or a forensic mortgage loan auditor to uncover the fraud and protect his constitutional and property rights until he lost title to his property following the illegal foreclosure sale. In other words, defendants were successful in defrauding Plaintiff to his great detriment. Compl., ¶ 70.

On information and belief, defendants or their agents paid Plaintiff's tenants, who

1 resided on the Subject property, to vacate the leased premises sometime before the  
 2 foreclosure sale occurred. Therefore, Plaintiff lost the income generated by the  
 3 Property. And, of course, Plaintiff has lost his valuable real estate which was  
 4 illegally purchased by BOA/HSBC for \$432,000.00 and his creditworthiness has been  
 5 substantially impaired. Therefore, Plaintiff has suffered direct pecuniary loss as a  
 6 result of his justifiable reliance on the deliberate misrepresentations set forth in the  
 7 deliberately fraudulent assignments and foreclosure documents. In addition, Plaintiff  
 8 has suffered severe emotional distress as a result of the fraud perpetrated upon him by  
 9 all of the Defendants. Compl., ¶ 71.

10 For the foregoing reasons, Plaintiff has raised triable issues concerning his fraud count.

### 11 **I. Plaintiff's Cancellation of Instruments Claim Raises Triable Issues.**

12 Defendants re-iterate their baseless contentions that Plaintiff has not shown any grounds for  
 13 challenging the validity of the assignment or foreclosure documents and that Plaintiff is required to  
 14 pay arrearages. Motion at 19-20. Defendants also contend that "[a]s the trustee's sale has already  
 15 concluded, there is nothing left to perform on the loan contract". Motion at 19. The assignments  
 16 and foreclosure documents are void, as discussed with particularity throughout this Opposition.  
 17 Moreover, Plaintiff seeks to unwind the fraudulent and void foreclosure sale; therefore, the validity  
 18 of the loan contract remains a viable issue in dispute. Finally, Plaintiff is not required to pay  
 19 arrearages because none of the Defendants has standing to collect them. *See Glaski v. Bank of*  
 20 *America, N.A.*, (2013) 218 Cal. App. 4<sup>th</sup> 1019 (tender is not required to maintain causes of action  
 21 for wrongful foreclosure, quiet title and cancellation of instruments where the foreclosure sale is  
 22 void).

23 Therefore, Defendants' Motion for Summary Judgment on Plaintiff's Cancellation of  
 24 Instruments count must be denied.

### 25 **J. BANA, An Invalid Beneficiary, Had No Authority to Substitute the Trustee**

26 Defendants disagree with Plaintiff's allegation that MERS had no interest in Plaintiff's loan  
 27 to convey to BAC Home Loans Servicing, Defendant BANA's predecessor-in-interest. Motion at  
 28 20-21. As only valid beneficiaries may substitute a trustee under a deed of trust, and Defendant  
 BANA held no beneficial interest in Plaintiff's mortgage, the Substitution of Trustee is null and  
 void. Compl., ¶ 20. It is void for the additional reason that the document was executed by Tina  
 Sevillano, who was employed by Reconstrust, the proposed trustee, when she signed the  
 Substitution. Therefore, the proposed trustee impermissibly attempted to substitute itself as trustee.



1 Compl., ¶ 21. Consequently, Defendants' Motion for Summary Judgment as to Count VI, violation  
2 of Cal. Civ. Code section 2934(a)(1)(A) must be denied.

### 3 **K. Plaintiff Has Standing to Pursue His UCL Claim**

4 Defendants contend that Plaintiff has not established that Defendants have violated the UCL  
5 (Bus. & Profs. Code section 17200 *et seq.*) because he has not stated a valid predicate violation  
6 under the unlawful business practices prong of the statute. Motion at 21. Plaintiff's UCL claims  
7 are based on Defendants' fraudulent, unfair and deceptive business practices. Compl., ¶¶ 84-  
8 85. Plaintiff's allegations are factually analogous to those asserted by the Plaintiff in *Naranjo v.*  
9 *SBMC Mortgage*, 2012 WL 3030370 (S.D. Cal. July 24, 2012). In *Naranjo*, plaintiff alleged  
10 that the transfer of rights to the securities trust was improper and that, therefore, the defendants  
11 lacked the legal right either to collect on the debt or to enforce the underlying security interest.  
12 *Id.*

13 The *Naranjo* plaintiff alleged injury-in-fact as a result of defendants' collection of  
14 mortgage payments that, purportedly, they had no right to collect. The court determined that  
15 the alleged injuries were monetary, but could also result in the loss of plaintiff's property. The  
16 court further determined that the injuries were causally connected to the Defendants' conduct.  
17 Accordingly, the court ruled that plaintiff had standing to pursue her UCL claim. *Id.*

18 In the case under consideration, Plaintiff alleges damages resulting from his justifiable  
19 reliance on Defendants' fraudulent documents and other foreclosure activity including loss of  
20 his home and rental income. Therefore, Plaintiff has established the causal connection  
21 between Defendants' fraud and the damages he has sustained as a consequence of Defendants'  
22 fraudulent activities. Consequently, Plaintiff has standing under the fraudulent conduct prong of  
23 the UCL. In fact, his Complaint is predicated on the fraudulent conduct of the Defendants. As  
24 discussed in section IV.H, above, Plaintiff has alleged fraud with the requisite specificity.  
25 Furthermore, Plaintiff has specifically alleged that Defendants' fraudulent conduct is designed to  
26 defraud California consumers and enrich Defendants at the expense of consumers in this State. *See*  
27 Compl., ¶ 86. Therefore, Plaintiff may pursue cause of action under the fraudulent conduct prong  
28 of the UCL. *See Subramani, supra*, at 15 ("the Court finds that Plaintiff has adequately pled a UCL

1 fraud claim, based on his allegation that Defendant's behavior, described above, is likely to deceive  
2 consumers").

3 Plaintiff has also specifically alleged unlawful conduct and deceptive business practices on  
4 Defendants' part. The predicate violations of law required to maintain an action for unlawful  
5 conduct under the UCL are legion and are specified in ¶ 85 of the Complaint. These violations  
6 include violation of Civil Code sections 1709, 1710, 2924(a)(1), 2924 (a)(1)(C) and 2934a(1)(A).  
7 Each allegation of unlawful conduct is specifically ascribed to a particular Defendant. *See* Compl.  
8 ¶¶ 85(a)-(h). As explained throughout this Opposition, Defendants' objections to the underlying  
9 violations are wholly without merit. Therefore, Plaintiff has standing under the unlawful conduct  
10 prong of the UCL.

11 Plaintiff further alleges that Defendants' unlawful conduct also constitutes deceptive  
12 business practices. Compl. ¶¶ 84, 85, 86. Plaintiff alleges that Defendants' misconduct is ongoing  
13 and has given each of the Defendants unfair competitive advantage over their competitors. Plaintiff  
14 further alleges that Defendants' fraudulent conduct is specifically designed to defraud California  
15 consumers and enrich Defendants at the expense of consumers in the State. Finally, Plaintiff avers  
16 that the complained of conduct promotes an incipient violation of consumer law, or violates the  
17 policy or spirit of such law or otherwise significantly threatens or harms competition. Compl., ¶¶  
18 86, 88.

19 For the foregoing reasons, Plaintiff has standing to pursue his UCL cause of action.

## 20 **V. CONCLUSION**

21 For the foregoing reasons, Plaintiff respectfully requests that the court deny Defendants'  
22 Motion for Summary Judgment, Or In the alternative, Alternative Adjudication, in its entirety.  
23 Alternatively, Plaintiff requests that the Court deny or defer consideration of the Motion to allow  
24 discovery pursuant to Fed. R. Civ. P 56(d)(1).

25 Dated: December 23, 2013

LAW OFFICES OF CHARLES T. MARSHALL

26 /s/ Charles T. Marshall

27 Charles T. Marshall  
28 Attorney for the Plaintiff  
MOTI KOKA